

# NATIONAL HISTORIC PRESERVATION ACT

## OVERVIEW

Section 106 of the National Historic Preservation Act (NHPA) requires federal agencies to evaluate the effects of federal undertakings on historical, archaeological, and cultural resources. An agency is required to coordinate with the State or Tribal Historic Preservation Officer (SHPO/THPO) and other interested parties throughout the Section 106 process. The [Advisory Council on Historic Preservation \(ACHP\)](#) is an independent federal agency that serves as a primary policy advisor to the president and Congress on historic preservation matters. This 20-member board is responsible for overseeing how Section 106 reviews are carried out. The ACHP have issued regulations to guide Section 106 review.

Federal agencies must initiate Section 106 review. Most of the review takes place between the agency and the SHPO/THPO. The [SHPO](#) is appointed by the governor and coordinates the State's historic preservation program. Each federally recognized tribe may designate a [THPO](#) for Section 106 consultation when tribal lands are involved.

To successfully complete Section 106 review, Federal agencies must:

- Determine if Section 106 of NHPA applies to a given project, and, if so, initiate the review;
- Gather information to decide which properties in the project area are listed on or eligible for the National Register of Historic Places;
- Determine how historic properties might be affected;
- Explore alternatives to avoid or reduce harm to historic properties; and
- Reach agreement with the SHPO/THPO (and the ACHP in some cases) on measures to deal with any adverse effects or obtain advisory comments from the ACHP, which are sent to the head of the agency.

## WHO NEEDS TO COMPLY?

NHPA requirements apply to all CALFED actions that are located on federal land, sponsored by a federal agency, permitted by a federal agency, or funded with federal monies.

## HOW LONG DOES THE APPROVAL PROCESS TAKE?

There are no specific time restrictions to complete this process as a whole. Typically, agency preparation of proper documentation is the lengthiest part of the process. The agency needs to consult with the SHPO/THPO regarding public participation in Section 106 review. Once an agency completes the appropriate documentation and submits its Section 106 findings to the SHPO/THPO, the SHPO/THPO has 30 days to review and comment. The ACHP has an

additional 15 days to review the findings if requested by the agency, the SHPO/THPO, or if the ACHP decides on its own to review the findings. Comments from SHPO and the ACHP, however, may result in a determination that additional documentation or other requirements should be completed. The NHPA compliance process may be undertaken at the same time as the NEPA compliance process.

### **WHAT INFORMATION DOES THE APPLICANT NEED TO PROVIDE?**

See “What Does the Application and Evaluation Process Entail?” below.

### **WHAT IS THE FEE?**

There is no application fee to comply with the NHPA.

### **WHAT DOES THE APPLICATION AND EVALUATION PROCESS ENTAIL?**

The responsible federal agency first determines whether it has an undertaking that could affect historic properties, which are properties that are included in or meet the criteria for the National Register of Historic Places (NRHP). If so, it must identify the appropriate SHPO/THPO with whom to consult during the process. The agency should also plan to involve the public and Indian tribes and to identify other potential consulting parties.

However, before consulting with the SHPO/THPO, the federal agency should review any programmatic agreements that may have been entered into by the agency and the SHPO/THPO and ACHP. The programmatic agreement may contain the appropriate mitigation that, if incorporated into the proposed project, may make further Section 106 compliance unnecessary. If the agency determines that it has no undertaking that could affect historic properties, the agency has no further Section 106 obligations.

If the agency’s undertaking could affect historic properties, there are four basic steps in the Section 106 process (described below and shown in [Figure 7](#)) during which the federal agency works with the SHPO to assess the potential effects of proposed actions:

- Step 1: Initiation of the Section 106 Process pursuant to 36 CFR 800.3.
- Step 2: Identification of Historic Properties pursuant to 36 CFR 800.4.
- Step 3: Assessment of Adverse Effects pursuant to 36 CFR 800.5.
- Step 4: Resolution of Adverse Effects pursuant to 36 CFR 800.6.

### **STEP 1: INITIATION OF THE SECTION 106 PROCESS**

The federal agency determines whether the proposed action is an undertaking as defined in 800.16(y) and if it is a type of activity that has the potential to cause effects on historic properties. The agency should coordinate steps in the Section 106 process with those procedures and document preparation reviews that comply with NEPA, Native American Graves Protection and Repatriation Act, the American Indian Religious Freedom Act, the Archaeological Resources Protection Act, and Section 4 (f) of the Department of Transportation Act, pursuant to

36 CFR 800.3. It is in this step of the Section 106 process that the agency identifies the appropriate SHPO/THPO as well as other agencies that should be consulted and initiate consultation.

## **STEP 2: IDENTIFICATION OF HISTORIC PROPERTIES**

The scope of the effort to identify historic properties is determined as part of the consultation process, initiated in Step 1. Normally, the steps for identifying historic properties are:

- Determine and document the Area of Potential Effects (APE).
- Review existing information on historic properties within the APE, including data about possible historic properties not yet identified.
- Seek information from consulting parties or individuals likely to have information about historic properties in the APE and identify issues related to the potential effects of the undertaking on historic properties.
- Gather information from Indian tribes about sites of religious or cultural significance to them on or off tribal lands. This information is subject to confidentiality measures listed in the regulations.
- Make a good faith effort to identify historic properties in the APE. This typically includes, but is not necessarily limited to, consultation with Indian tribes, oral history interviews, records searches, background research, interviews, and field surveys.
- Evaluate the significance of identified properties by applying the National Register criteria as defined in 36 CFR part 63 in consultation with the SHPO/THPO and any Indian tribe that attaches religious and cultural significance to the identified properties.
- Determine if a property is eligible for the National Register and Section 106. Follow guidelines established in the regulations if consulting parties disagree with agency determination that property is not eligible. (See Assessment of Adverse Effects.)

Federally-recognized Indian tribes must be consulted to determine if sites of religious or cultural significance to them are present in the APE. The lead Federal agency should be the contact with tribes. Tribes are initially contacted by registered letter and a follow-up telephone call or a repeat registered letter requesting their participation in the Section 106 process. The letter, addressed to the tribal chairperson, should describe the proposed undertaking, provide a delineation of the APE, make a request for information regarding places of religious or cultural significance within the APE, provide a confidentiality clause to protect any information provided, and request a point of contact. Additional consultation may be necessary, depending on the

outcome of the initial contacts. Documentation of this consultation is included in the inventory report.

In California, non-Federally recognized Indian tribes may be identified by contacting the Native American Heritage Commission. Non-Federally recognized Indian tribes may participate in the Section 106 process as "additional consulting parties."-

As part of this process, a project proponent or permit applicant other than the federal agency may prepare a cultural resources inventory report for consideration and processing by the federal agency. In such cases, the inventory shall be submitted to the lead federal agency for review. This agency is responsible for submitting the inventory report to the SHPO/THPO and other interested parties.

### **STEP 3: ASSESSMENT OF ADVERSE EFFECTS**

Once historic properties have been identified and found to meet NRHP criteria, the federal agency, in consultation with the SHPO/THPO, shall determine if the proposed undertaking will adversely affect the historic properties by applying the criteria of adverse effect (36 CFR 800.5).

If the agency proposes a finding of no adverse effect, the agency shall notify all consulting parties. If the SHPO/THPO agree with the finding, the undertaking may proceed. If any consulting parties disagree with the finding, additional consultation shall be initiated between the parties or the ACHP shall be requested to review the finding.

If the agency proposes a finding of adverse effect, the agency shall consult further to resolve the adverse effect pursuant to 36 CFR 800.6 and shall notify the ACHP of the finding of adverse effects.

### **STEP 4: RESOLUTION OF ADVERSE EFFECTS**

In consultation with the SHPO/THPO and other consulting parties, the agency shall develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize, or mitigate adverse effects on historic properties. Once agreement is reached on ways to avoid, minimize, or mitigate adverse effects on historic properties, a Memorandum of Agreement (MOA) shall be executed which evidences the agency's compliance with Section 106 of the NHPA. The agency shall ensure that the undertaking is carried out in accordance with the MOA. A two-party MOA may be developed between the SHPO and the agency, if the ACHP decides not to participate, pursuant to 36 CFR 800. Other consulting parties, such as Indian tribes, may be invited to be signatories to the MOA as well.

The ACHP shall be invited to participate in consultation when the agency wants the ACHP participation, when the undertaking has an adverse effect on a National Historic Landmark, and when a Programmatic Agreement will be prepared.

## **DOES THIS PROCESS TRIGGER THE NEED FOR COMPLIANCE WITH OTHER REGULATIONS?**

Section 106 does not trigger any other environmental compliance requirements.

## **WHAT ARE THE OPPORTUNITIES FOR FACILITATING COMPLIANCE WITH THIS PROCESS?**

The following are recommended steps to simplify and streamline the Section 106 process for CALFED actions.

- **Formally initiate the Section 106 process as early as possible with the SHPO/THPO.** Doing so provides two principal benefits:
  - The ACHP regulations indicate that avoidance may be the preferred method of addressing potential impacts on historic resources. If historic resources that may be affected are identified early enough in the project design stage, alternative sites or designs that would avoid or at least mitigate these effects may still be available.
  - The lengthy Section 106 process should be one of the first environmental regulatory processes undertaken. By contacting the SHPO early in the process, the project proponent can set a realistic time line for Section 106 compliance.

**Enlist the assistance of experts on specific regions and types of properties when developing appropriate mitigation.** The historic resources in a particular region may differ considerably from those located in other regions. Obtaining assistance from experts could greatly reduce the amount of time needed to complete consultation with the SHPO.

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